

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**February 14, 2013**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2012AP2076-CR**

**Cir. Ct. No. 2011CT38**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**AMANDA L. KRATOCHWILL,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Iowa County:  
WILLIAM D. DYKE, Judge. *Affirmed.*

¶1 KLOPPENBURG, J.<sup>1</sup> Amanda L. Kratochwill appeals from a judgment of conviction for operating a vehicle while under the influence of an

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

intoxicant, as a third offense, in violation of WIS. STAT. § 346.63(1)(a). Kratochwill contends that her arrest was not lawful because the arresting officer lacked probable cause to arrest Kratochwill for operating while intoxicated. This court concludes that the arresting officer had probable cause to arrest Kratochwill and therefore affirms.

## BACKGROUND

¶2 On April 17, 2011, at approximately 1:40 a.m., Iowa County Deputy David Sabot stopped a vehicle driven by Kratochwill for speeding. When he approached the driver's side window of the car, Deputy Sabot observed the presence of four passengers, a strong smell of intoxicants coming from the car, and an open can of beer sitting in the front passenger cup holder.

¶3 Deputy Sabot advised Kratochwill of her speed. She did not provide a response. Deputy Sabot noted that Kratochwill looked nervous, had glassy eyes, and had "a strong odor of intoxicants emanating from her person."

¶4 After another officer arrived to lend assistance, Deputy Sabot observed a brown paper bag with what appeared to be a "six pack container" on the floor of the rear driver's side, next to a passenger's legs. Deputy Sabot asked one of the passengers to show him the bag, and he observed that it was an empty six pack container. Deputy Sabot asked the passengers of the vehicle to turn over any other intoxicants that were present. The passengers turned over open containers that were "cool and partially full of beer." Deputy Sabot also observed another container appearing to be an "empty 18 pack" in the rear cargo area of the vehicle.

¶5 Deputy Sabot asked Kratochwill how much alcohol she had consumed that night. Kratochwill stated that she had consumed three to four beers in a five-hour span. Deputy Sabot informed Kratochwill that he was going to administer field sobriety tests.

¶6 Deputy Sabot asked Kratochwill whether she preferred to perform the tests at the traffic stop location, or two blocks away at the Highland Police Department, because it was cold and windy. Kratochwill decided to perform the tests at the police station. Upon arrival at the police station, Deputy Sabot administered the horizontal-gaze-nystagmus, walk-and-turn, and one-leg-stand tests. Deputy Sabot observed six out of six clues on the horizontal-gaze-nystagmus test. On the walk-and-turn test, Deputy Sabot observed one out of eight clues. Finally, Deputy Sabot observed two out of four clues during the one-leg-stand test.

¶7 Based on his certification to conduct standardized field sobriety tests under the National Highway Safety Administration and his seventeen years of law enforcement experience, Deputy Sabot concluded that the results of the field tests, particularly the result of the horizontal-gaze-nystagmus test, prompted him to further administer a preliminary breath test. He conducted the preliminary breath test twice. Each time the result was approximately 0.175, which indicated that Kratochwill was intoxicated. Deputy Sabot placed Kratochwill under arrest for operating while intoxicated.

¶8 During the subsequent proceedings, Kratochwill filed a motion to suppress all evidence obtained as a consequence of her allegedly unlawful arrest. After evidentiary hearings held on August 19 and September 21, 2011, the circuit

court denied the motion. The circuit court entered a judgment of conviction on July 10, 2012. Kratochwill now appeals.

## DISCUSSION

¶9 On appeal, Kratochwill argues that: (1) the totality of the circumstances failed to establish probable cause to arrest; and (2) her performance on the field sobriety tests did not establish probable cause to arrest, because Deputy Sabot compromised the tests' validity by deviating from his training in interpreting her performance on the tests.

¶10 Whether undisputed facts constitute probable cause is a question of law that we review without deference to the trial court. *State v. Kasian*, 207 Wis. 2d 611, 621, 558 N.W.2d 687 (Ct. App. 1996). Probable cause exists when the totality of the circumstances, within the arresting officer's knowledge at the time of the arrest, are such that a reasonable police officer would believe that the defendant probably operated a vehicle under the influence of an intoxicant. *State v. Babbitt*, 188 Wis. 2d 349, 356, 525 N.W.2d 102 (Ct. App. 1994). The court applies an objective standard, "considering the information available to the officer and the officer's training and experience." *State v. Lange*, 2009 WI 49, ¶20, 317 Wis. 2d 383, 766 N.W.2d 551.

¶11 Turning to the facts in this case, Deputy Sabot immediately observed the strong odor of intoxicants emanating from the vehicle and from Kratochwill. Deputy Sabot also observed open intoxicants in the vehicle along with empty six- and eighteen-pack containers. Kratochwill admitted to consuming intoxicants and was stopped at 1:40 a.m. Sunday morning. The Wisconsin Supreme Court has acknowledged that facts such as these are evidence of intoxicant usage and support the existence of probable cause. *See Lange*, 317 Wis. 2d 383, ¶37 (listing odors,

an admission, and containers as evidence of intoxicant usage that ordinarily exist in drunk driving cases and strengthen the existence of probable cause). As for the date and time of the traffic stop, “[i]t is ... common knowledge that people tend to drink during the weekend when they do not have to go to work the following morning.” *Id.*, ¶32. In addition to these indicators of intoxication, Kratochwill exhibited six out of six clues on the horizontal-gaze-nystagmus test, and two out of four clues on the one-leg-stand test. Finally, Kratochwill’s preliminary breath test result indicated that Kratochwill’s blood alcohol level was significantly over the legal limit. *See* WIS. STAT. § 343.303 (stating that the result of a preliminary breath test may be used by an officer for the purpose of deciding whether or not the person shall be arrested for operating while intoxicated). Based on these facts, the totality of these circumstances would lead a reasonable police officer to conclude that Kratochwill was probably operating her vehicle while intoxicated, and therefore, Deputy Sabot had probable cause to arrest her for that offense.

¶12 Kratochwill argues that Deputy Sabot deviated from his training while evaluating the field sobriety tests and thus compromised the validity of the field testing. Kratochwill bases this allegation on the fact that, in his report, Deputy Sabot stated: “Research from the National Highway Traffic Safety Administration shows that when four or more clues are observed during HGN, that an average of 88% of subjects tested have an alcohol concentration greater than .08.” Deputy Sabot testified that he obtained these figures, and others included in his report related to the other field sobriety tests, from an online, updated manual on the National Highway Traffic Safety Administration’s website, and not from his most recent formal training in 2001. Kratochwill argues that this “deviation” from Deputy Sabot’s formal training in 2001 compromises the legitimacy of the tests and Deputy Sabot’s evaluations of her performance.

¶13 This court has previously explained that field sobriety tests are observational tools, “not litmus tests that scientifically correlate certain types or numbers of ‘clues’ to various blood alcohol concentrations.” *City of West Bend v. Wilkens*, 2005 WI App 36, ¶17, 278 Wis. 2d 643, 693 N.W.2d 324. In other words, field sobriety tests give officers an opportunity to look for indicia of intoxication without employing a scientific test. *Id.* We treat an officer’s observations with respect to field sobriety tests as we do any other observations of indicia of intoxication by the officer. *Id.*, ¶19. Here, Deputy Sabot observed Kratochwill stagger during the walk-and-turn test, raise her hands and lose her balance on the one-leg-stand, and exhibit nystagmus prior to a forty-five degree angle in both eyes. Given these observations and Deputy Sabot’s seventeen years’ experience as a law enforcement officer, the court finds no reason to discount his observations during the field sobriety tests. In addition, the court does not understand Deputy Sabot’s reference to recent National Highway Traffic Safety Administration research to constitute a deviation from, rather than a supplement to, his 2001 training.

¶14 Moreover, even without consideration of Kratochwill’s performance on the field sobriety tests, probable cause to arrest would still exist. When a driver’s performance on field sobriety tests does not produce enough evidence to establish probable cause to arrest, the legislature authorizes an officer’s use of the preliminary breath test, provided the officer has “probable cause to believe” that the driver is operating while intoxicated. *County of Jefferson v. Renz*, 231 Wis. 2d 293, 310-11, 603 N.W.2d 541 (1999); *see* WIS. STAT. § 343.303. Here, Kratochwill exhibited several indicators of intoxication – admitting she had consumed alcohol, having open containers of alcohol in her vehicle, and smelling of alcohol – which provided “probable cause to believe” that Kratochwill was

operating while intoxicated. These indicators combined with the result from the properly-administered preliminary breath test establish probable cause to arrest, even without consideration of the field sobriety tests.

### CONCLUSION

¶15 For the reasons stated above, this court affirms the circuit court's judgment of conviction and order denying the motion to suppress.

*By the Court.*—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

